Article 18: Liability of the Platform Operator for the Non-Performance of Suppliers

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ARTICLE 18: LIABILITY OF THE PLATFORM OPERATOR FOR THE NON-PERFORMANCE OF SUPPLIERS

1. If the customer can reasonably rely on the platform operator to have a predominant influence over the supplier, the platform operator is jointly liable with the supplier for the non-performance of the supplier--customer contract.
2. When assessing whether the customer can reasonably rely on the platform operator's predominant influence over the supplier, the following criteria are to be considered in particular:

(a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;
(b) The platform operator can withhold payments made by customers under supplier-customer contracts;
(c) The terms of the supplier-customer contract are essentially determined by the platform operator;
(d) The price to be paid by the customer is determined by the platform operator;
(e) The platform operator provides a uniform image of suppliers or a trademark;
(f) The marketing is focused on the platform operator and not on the suppliers;
(g) [OPT] The platform operator promises to monitor the conduct of suppliers.

1. Main content and function

Article 18 formulates the criteria of the platform operators dominating the suppliers in such a way that the business of the suppliers should also be attributed to the platform operator. The activity of such platform operator cannot be reduced to the role only of the 'intermediary.'[1]

When trying to establish rules to govern the liability of the platform operator, the Discussion Draft faces a difficulty caused by the ambiguity of the concept of the intermediary platform itself. The envisaged directive should apply to the online intermediary platforms as defined in Article 2 letter a. The categorization as intermediary encompasses numerous situations, but the border lines of these categories are not sharp.[2] On the one hand, there are the platforms, who offer merely a display for announcements. In these cases, the platform operator does not enter with the customers in any kind of contractual relationships. Hence, such platforms are not intermediaries and therefore they are not online intermediary platforms in the sense of the Discussion Draft.[3] There are also platform operators who dominate the suppliers so immensely that the suppliers do not enjoy any kind of freedom, and the commercial decisions do not depend on its own business judgement and, following the scheme of the operation of the platform, it cannot be assumed that the customer makes contract directly with the supplier. In such situations, the supplier could indeed be qualified as an employee. These two extreme situations of platform operators are generally excluded from the intended scope of application of the Discussion Draft. Between these two extreme positions, however, there are numerous situations that allow the qualification of the platform operator as intermediary. These situations encompass very different models of the platforms and their real position in the business of the supplier. Article 18 deals with that category of platform operators that, albeit fitting in the category of 'intermediary', dominate the business of the suppliers in a tremendous way.

In principle, as stated in Article 16 section 1, a platform operator who presents itself to customers and suppliers as an intermediary in a prominent way is not liable for the non-performance under supplier-customer contracts.[4] For the non-performance of an obligation of the supplier under the supplier-customer contract, the supplier is liable itself. The customer is entitled to remedies

[1] Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for the Consumer Contract Law' (2016) EuCML 3, 7–8.

[2] Karolina Wyrwińska, 'O rzetelności w internecie – platformy cyfrowe wobec konsumentów: uwagi na tle *loi pour une République numérique*' (2016) 3 Transformacje Prawa Prywatnego 83.

[3] Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for the Consumer Contract Law' (2016) EuCML 3.

[4] Cf. Art. 16 Commentary, 3.1. The meaning of Article 16 section 1.

directly against the supplier. A list of exceptions to this principle is presented in Article 16 section 2. Article 16 section 2 letter b refers to Article 18.[5] The legal effect of Article 18 concerns the extension of the liability of the platform operator in certain situations, and the extension of protection of the customer in the case of the non-performance of the obligation under the supplier-customer contract,[6] but also the protection of the supplier.[7] Under Article 18, the platform operator is liable (jointly with the supplier) to the customer for the non-performance of the obligation under the supplier-customer contract, not as a party of that contract, but (only) as an intermediary, if the platform operator presents itself to customers and suppliers as an intermediary in a prominent way.[8] If the platform operator does not present itself to customers as an intermediary in a prominent way, the platform operator may be liable to the customer as a party of the supplier-customer contract (*argumentum a contrario* from Article 16 section 1) under the applicable law.[9] This suggestion of the interpretation was not considered by the working group, but it is a possible interpretation of Article 16 section 1.

Article 18 applies irrespectively of the personal qualification of the customers. It is not confined only to consumers, but it also covers professional customers.

The provision of this article (and Chapter V as a whole) has a mandatory nature in the sense that the rights of the customer may not be excluded or limited by the national law.[10] At this stage it does not interfere with the status of the rules governing the supplier-customer contract according to the applicable law. These rules can be non-mandatory if the applicable law says so. As an option, the working group proposed a limitation of the mandatory nature of the provisions of Chapter V in the case when customers/platform users accepted by the platform operator are exclusively businesses. The character of the customer (consumer/business) has an influence on the liability of the

[5] Caroline Cauffmann, 'The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?' (2016) EuCML 235, 240.

[6] Ibidem. (The author compares the solution adopted in the Draft with the Commission's European Agenda, criticising the model suggested by the Commission, assuming the liability of the platform operator, only if it could be regarded as a service provider).

[7] The last goal is not clear in light of the present rule stated in Article 22 – see Art. 22 Commentary.

[8] See also Case C-149/15 *Wathelet v Garage Bietheres & Fils SPRL*) where the Court decided that the concept of 'seller', for the purposes Consumer Sales Directive, Article 1 section 2 letter c must be interpreted as covering also a trader acting as intermediary on behalf of a private individual who has not duly informed the consumer of the fact that the owner of the goods sold is a private individual, which it is for the referring court to determine, taking into account all the circumstances of the case. The above interpretation does not depend on whether the intermediary is remunerated for acting as intermediary. Considering this judgment, it must be stressed that the platform operator must inform the customer (and the supplier) about the goal of its acting as an intermediary and not as a party of the supplier-customer contract.

[9] Cf. Art. 16 Commentary, 3.1. The meaning of Article 16 section 1.

[10] Cf. Art. 10 Commentary, 1. Main content, function and sources.

platform operator in the circumstances of the case because of the different expectations from each party as a participant of the market.

2. Sources

While Article 18 is a proposal for the scheme of the platform's operator liability, the sources of inspiration of which may be identified in the text of the Package Travel Directive.[11] Also, similar reasoning can be traced on the CJEU case C-149/15 (*Wathelet*)[12] in the context of the Consumer Sales Directive. The CJEU decided that Article 1 section 2 letter c of the Consumer Sales Directive also applies to an intermediary that did not properly inform the consumer that he is acting on behalf of an individual who is a party to the sales contract, even if the intermediary is acting as the intermediary and is not the owner of goods. In the case of consumer sales concluded via the platform, the Consumer Sales Directive is applicable to the contract between the customer and the supplier, and hence the platform operator might be found liable already under the existing acquis.

3. Explanation

Under Article 18 the liability of the platform operator for the non-performance of the supplier's obligation under the supplier-customer contract is based on the customer's reliance on the platform operator's predominant influence over the supplier. The customer's reliance refers to the fact that the platform operator's role is not confined to the function of intermediary only, but the platform operator plays an active part in developing the business of the supplier. The participation in this business can be attributed to the platform as such. Article 18 section 1 is a general clause that can be specified by the criteria arising from Article 18 section 2. Article 18 section 2 names the criterion that should be taken into consideration while assessing the dominant role of the platform operator over the supplier's activity. Neither this is an exclusive list of such circumstances, nor accumulation of the circumstances is required. The drafters used the technique of the 'moving system' (*das bewegliche System*)[13] to specify the general requirements of Article 18 section 1. It means that not all criteria need to be fulfilled in order for the liability to arise. The criteria

[11] Cf. Art. 16 Commentary, 2. Sources.

[12] Cf. Art. 11 Commentary, 5.3. Consequences and Sanctions; Art. 16 Commentary, 2. Sources; Art. 22 Commentary, 4. Relation to other provisions in the Discussion Draft.

[13] On the explanation of the 'moving system' see: Dirk Looschelders, *Die Mitverantwortlichkeit des Geschädigten im Privatrecht* (Mohr Siebeck 1999) 608–612.

provide support to the judge in determining, whether the platform operator is dominating in the sense of Article 18 section 1. The judge needs to balance these criteria, but also all other circumstances, not listed in Article 18 section 2, which might give foundation to the customer's reliance on the predominant influence of the platform operator over the supplier, to meet the conclusion.

The platform operator's liability to the customer is justified in such case by the fact that the platform operator, while theoretically being a third party to the supplier-customer contract, in fact has a power (usually under its general terms and conditions) to limit the freedom of contract of the supplier and customer alike. In other words, the platform operator actively participates in drafting and/or performing the supplier-customer contract. The supplier, as a platform user, does not have any influence on such behaviour of the platform operator.

The main scope of the regulation of Article 18 is stated in Article 18 section 2 that regulates the criteria which are to be considered in assessing whether the customer can reasonably rely on the platform operator's predominant influence over the supplier. As explained above, the criteria stated in Article 18 section 2 letters a–f (and optionally letter g) serve to determine whether the customer can reasonably rely on the platform operator having a predominant influence over the supplier, but there is no need to prove that all these criteria are fulfilled in a given case. These criteria have various levels of impact on the assessment of whether the platform operator has a predominant influence over the supplier. In principle, if more criteria are fulfilled, the more evident it becomes under Article 18 that the platform operator is liable to the customer for the non-performance under the supplier-customer contract, though in some cases it will be enough if one criterion is fulfilled (for example, stated in Article 18 section 2 letter c or d).

The criterion set out in Article 18 section 2 letter a relates to how the supplier-customer contract was concluded, referring to the conclusion exclusively through facilities provided by the platform. That means that the supplier and the customer are (usually) platform users and conclude the contract using the platform, which means that they have accepted the standard terms and conditions of the platform operator, the system of choosing the customer and the supplier, the information provided to the customer before concluding the contract etc. This criterion refers to the situation when the parties are bound by the system of concluding a contract prepared and controlled exclusively by the platform operator.

The criterion stated in Article 18 section 2 letter b concerns the platform operator's right to withhold the payment made by the customer under the supplier-customer contract, while not being a party to this contract and not being a creditor of the customer. Under the supplier-platform operator contract, the parties may decide (normally it is the platform operator who does so) that the payment made by the customer (minus the commission

payable to the platform operator) to the supplier will be sent to the supplier after a specific period of time (for example by the end of the month), and not immediately after the platform operator only (only an intermediary in the payment system) receives the payment from the customer. This is the situation when the supplier concludes a contract with the customer via the platform, but the platform operator transmits the payment made the customer at a time set by the platform operator, and usually in an amount fixed by the platform operator.

The criterion stated in Article 18 section 2 letter c concerns the platform operator's right to determine the terms of the supplier-customer contract. This is about the direct influence of the platform operator on the content of the supplier-customer contract. The platform operator, being a third party, has the power to determine the rights and obligations of the supplier and the customer in their contract, and the parties are bound by that contract. This provision states that this determination by the platform operator needs to be essential. The essentiality should be assessed considering the importance of the terms set by the platform operator, for example whether they concern the main subject matter of the contract, but also the quantity of the terms formulated by the platform operator. The general assessment should lead to the conclusion that it was the platform operator who pre-formulated the supplier-customer contract completely or essentially, without giving the users a possibility of changing the terms. The criterion stated in Article 18 section 2 letter d is the continuation of the provision of Article 18 section 2 letter c concerning the terms of the supplier-customer contract, but concentrates on the price to be paid by the customer. Distinguishing the price from other terms is justified due to its special importance for both parties of the contract and for the contract overall. This is an essential contract term concerning the main obligation of the customer and the main right of the supplier. The calculation and determination of the price by the platform operator means that the platform operator is entitled to consider its own interest in this calculation and the intended profit.

The criterion stated in Article 18 section 2 letter e concentrates on the uniformity of the image of suppliers contracting with customers via the platform, or on the suppliers using the platform operator's trademark. This provision as well as the subsequent ones (Article 18 section 2 letter f and optionally Article 18 section 2 letter g) are based on the customer relying on the predominant influence of the platform operator connected with the assumption that the suppliers perform their obligations under a control by the platform operator. The Discussion Draft does not formulate an assumption about a contract of employment between the platform operator and the supplier, but takes into account the circumstances that prove that it is reasonable from the point of

view of the customer to know that the supplier is a part of the platform operator's business.[14]

The criterion stated in Article 18 section 2 letter f relates to the identification of the supplier with the platform operator's business, but concentrates on the uniform marketing of the goods or services provided by the supplier via the platform. Under this provision one of the important circumstances is marketing of the goods, services or even the contracts concluded via the platform by the platform operator that focuses on the platform operator rather than on the suppliers. In other words, the marketing concentrates on promoting the platform operator's interest and profit and not the suppliers' interest and profit.

The last criterion stated in Article 18 section 2 letter g is based on the promise of the platform operator to monitor the conduct of the suppliers. The scope of the literal meaning of this provision is broad (probably too broad), because it is not clear what is the scope is of the monitoring the suppliers' conduct – whether it is limited to the supplier's conduct at the time of performing the obligations under the supplier-customer contract, or whether there is no such limitation and the platform operator promises to monitor the supplier's conduct also at the time not related to the performance of the supplier-customer contract.

When interpreting this provision functionally, it must be assessed whether the platform operator promises to monitor the suppliers' conduct at the time of performing the supplier-customer contract, and possibly at the reasonable time before the start of the performance and after the performance is finished. The last view could be controversial, however, as it not sufficiently justified by the text of the proposal. The platform operator's liability under Article 18 is based on the principle of joint liability with the supplier. That means that the customer is entitled to choose whether to claim its remedy against the supplier or the platform operator, or both. The supplier and the platform operator are liable for the non-performance of the supplier's obligation under the supplier-customer contract in the same way, i.e. without any limitation of the platform operator's liability. The catalogue of the customer's remedies depends on the contract and the non-performance of the obligation under the applicable law. The customer is entitled to have the performance that conforms to the contract, through repair or replacement, or may require an appropriate reduction in the price or terminate the contract, or to damages, if the law applicable for the supplier-customer contract provides for such remedies. The joint liability of the platform operator depends on the contract concluded by the supplier and the customer. The operator and the supplier are jointly liable, but the liability of

[14] Compare: *O'Connor v Uber Technologies* United States District Court Northern District of California of 1.09.2015, case C-13-3826 EMC and *Aslam, Farrar and Others v Uber* Employment Tribunal of 12.10.2016, case 2202551/2015. The Courts decided that UBER concluded an employment contracts with drivers who work for UBER. See also Marie Jull Sørensen, 'Private Law Perspectives on Platform Law Services' (2016) EuCML 15, 16, Opinion of Advocate General M. Szpunar delivered on 4 July 2017, CJEU Case C-320/16, Uber France SAS.

the operator is not subsidiary.[15] In the event of the non-performance of the supplier, the platform operator would be primarily liable for the non-performance (understood broadly as not only full or partial non-performance, but also for improper performance).

4. Relation to other provisions in the Discussion Draft

The liability provided in Article 18 has a self-standing nature. However, while applying this provision it is necessary to take notice of Article 2 that contains the list of definitions, among others: the 'online intermediary platform' (Article 2 letter a); the 'platform operator' (Article 2 letter b); the 'customer' (Article 2 letter c); the 'supplier' (Article 2 letter d); 'supplier-customer contract' (Article 2 letter e); 'platform customer-contract' (Article 2 letter f); 'platform-supplier contract' (Article 2 letter g).[16] Obviously, Article 18 is linked with Article 16, which is the introductory provision to the entire system of Chapter V.

5. Criticism

The scope of the platforms operator's liability is not sufficiently explained by the wording of Article 18. To make the system more operable, the relationship between the obligation of the supplier and the obligation of the platform operator needs to be regulated more explicitly. One of the possible solutions could be Article 16 b, as suggested in the comments to Article 16. The description of the link between the obligation of the supplier and the obligation of the operator, limited only to categorising it as 'joint liability' is not sufficient, since the 'joint liability' has not been defined in the text of the Discussion Draft. Also, it should be clarified whether the operator of the platform has these same defences as the supplier. The new suggested Article 16b section 4 contains the respective rule that could be sufficient to meet this challenge.

As mentioned above, Article 18 may very well serve the goal of protecting customers by providing them with direct remedies againt the platform operator, but at the same time it could serve the purpose of protecting the suppliers, by shifting the charge of the liability on the platform. However, due to the fact that Article 22 does not limit the possibility of the platform operator seeking a full redress form the supplier and also Article 18 does not limit in any way the liability of the supplier against the customer, the goal of protecting the supplier's interests cannot be achieved.

[15] Cf. Art. 16 Commentary, 3.1. The meaning of Article 16 section 1.

[16] Cf. Art. 2 Commentary, 2. Sources; 3. Explanation.

Under Article 22 section 1 letter b[17] the platform operator has a right to redress, i.e. the right to be indemnified by the supplier without any limitation or restriction. Such an effect is not consistent with the criteria stated in Article 18 section 2, which sets out the criteria that indicate that the supplier performs its obligation under the control (*sensu largo*) of the platform operator, or in its interest, or in connection with the platform operator's business. In some cases, the platform operator formulates the contract terms of the supplier-customer contracts concerning the manner of performing the supplier's obligation and the liability of the supplier. Knowing that risk, the platform operator will be able to take effective measures to protect its own rights to redress against the supplier. In some cases, for example, if all the criteria stated in Article 18 section 2 are fulfilled, the right to redress it as regulated in Article 22 is unjustifiable, but this right should be limited. The criterion of the limitation can concentrate on the negligence of the supplier, meaning that the platform operator has the right to redress, as long as it has proven that the supplier did not perform its obligation in accordance with the supplier-customer contract because of its negligence.

[17] Cf. Art. 22 Commentary, 4. Relation to other provisions in the Discussion Draft.